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No. 91-443

In The

Supreme Court of the United States

October Term, 1991

DANIEL R. HODGE, M.D.,

Petitioner,

vs.

LAKESHORE HOSPITAL, INC., STAT SERVICES INC., JOSEPH G. CARDAMONE, M.D., LYNN FELDMAN, D.O., JAMES B. FOSTER, C.E.O.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT JOSEPH G. CARDAMONE, M.D. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the dismissal of a Complaint brought under 42 U.S.C. § 1981 where it wholly fails to allege a racially discriminatory motive for removing or dropping a physician's name from an Emergency Room Physician's Roster, and instead, merely sets forth disputes concerning that physician's lack of appropriate medical judgment.

2. Whether a claim under § 1981 of the Civil Rights Act is properly dismissed where the alleged discriminatory conduct involves, in essence, a termination from employment, and not the formation of a new contract.

3. Whether a defendant-doctor, not employed by the hospital, who was not personally involved in the decision to drop another doctor from an Emergency Room Physician's Roster, may be held liable for that decision under 42 U.S.C. § 1981.

4. Whether the Court of Appeals properly affirmed the dismissal of claims arising under 42 U.S.C. §§ 1985 and 1986, absent any evidence of state action.

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BRIEF FOR RESPONDENT JOSEPH G. CARDAMONE IN OPPOSITION

Joseph G. Cardamone, M.D. respectfully requests that this Court deny the petition for Writ of Certiorari seeking review of the Second Circuit's decision affirming without opinion the decision of the District Court in this case.

STATUTES INVOLVED

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985

. . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action . . .

COUNTERSTATEMENT OF THE CASE

Petitioner Daniel Hodge, a black physician, commenced this action on June 4, 1987, alleging that respondents Stat

Services, Inc. ("Stat Services"), Lake Shore Hospital ("Lake Shore"), Joseph G. Cardamone, M.D. ("Dr. Cardamone"), Lynn Feldman, D.O. ("Feldman"), and James B. Foster, C.E.O. ("Foster") had violated his civil rights under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 by dropping him from the Emergency Room Physician's Roster at Lakeshore. (AP. 9).[1/]

On August 3, 1987, Lake Shore and Dr. Foster moved to dismiss the Complaint for failure to allege facts showing disparate treatment or racially discriminatory motives, under 42 U.S.C. § 1981, and for his failure to state a

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1/ References to the Petitioner's Appendix to the petition are "AP. [page number]." References to the Appendix to the Second Circuit are "A. [page number]."

conspiracy cause of action under 42 U.S.C. §§ 1985 or 1986. (A. 39).

On August 10, 1987, Dr. Cardamone moved for partial summary judgment, or in the alternative, to dismiss the Complaint, essentially because: (a) Dr. Cardamone could not be liable under § 1981 because he had no personal involvement in the allegedly discriminatory decision to drop petitioner from the Emergency Room Physician's Roster; (b) petitioner failed to properly plead discriminatory motive, a prerequisite for liability under 42 U.S.C. § 1981; and (c) the § 1985 and § 1986 claims must fail for lack of the requisite state action. (A. 56, 63-81).

Petitioner cross-moved for summary judgment. (A. 84). Stat Services, and Feldman, having also moved to dismiss the Complaint (A.x), opposed petitioner's

cross-motion and requested attorneys' fees pursuant to Rule 11 of the Federal Rules of Civil Procedure ("FRCP"). (A. 163-169). Similarly, Lake Shore and Foster opposed the cross-motion and sought sanctions, pursuant to Rule 11. (A. 229). Dr. Cardamone opposed the cross-motion, but did not move for Rule 11 sanctions. (A. 219-226).

The District Court entered an Order, dated February 4, 1988, dismissing the Complaint in its entirety, denying petitioner's cross-motion for summary judgment and awarding costs and reasonable attorneys' fees, pursuant to Rule 11, in favor of all respondents (AP. 9-16).

In its decision, the District Court determined that petitioner merely described a history of disputes with respondents regarding his medical treatment of patients and made only conclusory allegations of

racial discrimination. The court then dismissed the claims under 42 U.S.C. § 1981 (AP. 14). The court also dismissed the §§ 1985 and 1986 claims because the necessary allegations of state action were lacking. (AP. 14). While the District Court granted costs and attorneys' fees under Rule 11, it withheld entry of the judgment until the question of the amount of the attorneys' fees could be decided. (A. vi). The court did not reach the issue, raised by Dr. Cardamone, that his lack of personal involvement in the decision to drop petitioner's name from the Emergency Room Physician's Roster warranted summary judgment dismissing the Complaint.

Thereafter, on February 17, 1988, the court ordered respondents to submit detailed affidavits in support of their applications for attorneys' fees. (AP. 17). On

February 19, 1988, petitioner appealed from the February 4, 1988 Order. (A. 242).

On April 20, 1988, the United States Court of Appeals for the Second Circuit issued a mandate dismissing the appeal, with sanctions, including double attorneys' fees. (AP. 8). In the meanwhile, counsel for all respondents submitted affidavits seeking attorneys' fees, as ordered by the court. (AP. 4-5). Petitioner opposed the application and requested that the court recuse itself "due to its conflicts of interest as a self-appointed medical expert witness for the defendants." (AP. 5). The District Court denied the application for recusal. (AP. 5). Stat Services and Dr. Feldman filed an affidavit seeking an award of attorneys' fees incurred in dismissing the appeal. (AP. 5). The District Court, by Order dated December,

1990 and by Judgment, dated December 21, 1990, awarded sanctions against petitioner in the sum of $2,000 ($500 to be paid to each of respondents' respective counsel). (AP. 4-6). Petitioner appealed, by Notice of Appeal dated January 4, 1991. (A. iv).

Oral argument was heard on May 9, 1991. (AP. 21-34). The Second Circuit entered an Order on May 15, 1991 affirming, without opinion, the District Court's judgment of December 21, 1990, and the interlocutory orders of February 4, 1988 and February 17, 1988 on which the final judgment was based in part for substantially the reasons set forth in Judge Curtin's opinions and orders. (AP. 1-2). The decisions of the District Court and the Second Circuit were all unpublished. Petitioner served his Petition for Writ of Certiorari to the

United States Court of Appeals for the Second Circuit on August 10, 1991.

STATEMENT OF THE FACTS

Petitioner Daniel Hodge, a black physician, was employed by Stat Services, which had contracted with Lake Shore to provide the hospital with emergency room services. Petitioner was granted temporary work privileges at Lake Shore in 1986, and he was reappointed for 1987 to 1988. (A. 230; A.5 ¶ 2). In January of 1987, petitioner was dropped from Lake Shore's Emergency Room Physician's Roster, and thereafter no longer scheduled to work. (A. ¶ 6).

As the District Court properly determined, this action was taken as a result of petitioner's questionable methods

of "medical treatment," which created disputes between him and respondents. (A. 234). The disputes concern numerous incidents of petitioner's callous attitude towards and/or improper treatment of patients. As the District Court noted, petitioner's own affidavit submitted on the motion, detailed, for more than 20 pages, the history of these disputes with respondents concerning his medical treatment decisions in the emergency room. (A. 232-234; 12-37).

Petitioner described, for example, treating an asthmatic woman whom he claimed was merely "overbreathing," as primarily hysterical. Petitioner also attested to numerous other incidents and disagreements over the proper method of dealing with patients, and he described these differences

of opinions in great detail in his affidavit. (A. 232-234).

As the court below found, notably absent from the Complaint or the affidavit submitted by petitioner was any evidence of discriminatory motivation for the differing opinion. (AP. 13-14). The District Court then properly concluded that all of the disputes clearly originated from serious differences about proper medical treatment, and not from racial discrimination. (AP. 13-14).

It is undisputed that Dr. Cardamone is not now, and never has been, an employee of Stat Services or Lake Shore. (A. 59, ¶ 3). He is a private physician in Dunkirk, New York, who merely has staff privileges at Lake Shore and voluntarily served as Chair of its Emergency Room Committee ("ERC") during the calendar year 1986. (A. 59,

¶ 6). After that time, he had no role or participation in the ERC's actions (A. 59, ¶ 6).

The ERC itself has no role in staffing decisions or scheduling of work in Lake Shore's Emergency Room ("ER"). (A. 64, ¶¶ 8-9). Its role is as a quality assurance committee, and in that capacity, the ERC reviews complaints about staff services and procedures. (A. 60, ¶ 8). Dr. Cardamone requested that the ERC evaluate petitioner's treatment of a patient with a nearly severed toe. because he deemed it to be very inadequate. (A. 141). In a December 2, 1986 letter he solicited Dr. Hodge's comments. (A. 144). This was the last action taken by Dr. Cardamone in connection with plaintiff and the ERC (A. 61). He did not make the decision to drop petitioner from the Emergency Room Physician's Roster.

In January 1987, petitioner was dropped from the Emergency Room Physician's Roster, and thereafter, was not scheduled to work. (A. 43).

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because the lower courts' decisions were based upon the well settled law of this Court and of the United States Courts of Appeals. This Court has held that to prevail under 42 U.S.C. § 1981, a plaintiff must prove purposeful discrimination. Patterson v. McLean Credit Union, 491 U.S. 164, (1989). The lower courts properly determined that petitioner failed to set forth any facts demonstrating the existence of a discriminatory motive for dropping him from the Emergency Room

Physician's Roster. The record below clearly shows that the decision to remove petitioner from the roster was made because of differences regarding methods of medical treatment.

The Petition should also be denied because a decision of this Court subsequent to the District Court's decision removes any doubt that the Complaint fails to state a claim under 42 U.S.C. § 1981. In Patterson v. McLean Credit Union, 491 U.S. 164, (1989), this Court held that 42 U.S.C. § 1981 protects only the right to make contracts and the right to enforce contracts, and does not extend to post-contract formation conduct. The circuit courts have uniformly held that an alleged discriminatory termination of a contract is not actionable under § 1981 because it involves neither the making nor

the enforcement of a contract. Petitioner's allegations relate only to the termination of his contract and therefore fail to state a claim under § 1981.

Yet another reason for denial of the Petition with respect to Dr. Cardamone is that Dr. Cardamone was not personally involved in the allegedly discriminatory decision. The courts have held that to be liable under § 1981, a defendant must be shown to have been directly and personally involved in a deprivation of a plaintiff's rights. This means that an individual defendant must participate in, authorize or direct the discriminatory conduct. The filing of a complaint or report which triggers an investigation does not implicate the person who filed the complaint. Dr. Cardamone had no control over the scheduling

of physicians to staff the emergency room and therefore cannot be liable under § 1981.

The lower courts also properly determined that petitioner's § 1985 and § 1986 claims must fail for lack of the requisite state action.

The District Court's decision was fully consistent with the law of the circuits and of this Court. It did not depart from the accepted course of judicial proceedings and does not call for an exercise of this Court's power of supervision. Therefore, respondent Joseph G. Cardamone, M.D., respectfully requests that the Petition for a Writ of Certiorari be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

POINT I

THE LOWER COURT'S DISMISSAL OF THE § 1981 CLAIM BECAUSE PETITIONER FAILED TO PLEAD FACTS ALLEGING PURPOSEFUL DISCRIMINATION WAS BASED UPON THE WELL SETTLED LAW OF THIS COURT

Under well-established law, to constitute a violation of 42 U.S.C. § 1981, there must be intentional racial discrimination and a refusal "to extend to a negro, solely because he is a negro, the same opportunity to enter into contracts as he extends "to similarly situated white people." General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982). To prevail, a plaintiff, including petitioner, must prove purposeful discrimination. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

Liability will not attach in the absence of intentional racial discrimination. General Building Contractors Ass'n v. Pennsylvania, 458 U.S. at 391. See also, Guardians Ass'n of New York City Police Department, Inc. v. Civil Service Commission, 633 F.2d 232, 267 (2d Cir. 1980), aff'd on other grounds, 463 U.S. 582. The essence of the discrimination claim is that a plaintiff received "dissimilar treatment" from similarly situated white persons. Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974).

The lower courts correctly determined this issue in the case consistent with this long and unbroken line of precedent. Petitioner failed to set forth any facts demonstrating the existence of a discriminatory motive for dropping him from

the Emergency Room Physician's Roster. (AP. 10-11). While petitioner's Complaint, motion papers and brief are littered with wild, conclusory accusations of racial discrimination, petitioner attests only to the fact that his form of medical treatment as an "independent professional" (Petition, p. 24) differs vastly from, and is superior to, respondents'. (A. 14-37).

Whatever differences in methods of medical treatment the parties may have, they do not raise or implicate any important federal question. Rather, as the courts below properly determined, they establish that petitioner was dropped from the Emergency Room Physician's Roster, not because he is black, but because he has continuously treated patients in a manner with which respondents disagree. (AP. 13). As properly determined by the District

Court, petitioner's claims arise from "non-racial reasons for his dismissal." (AP. 13-14) (citing Armstead v. Town of Harrison, 579 F. Supp. 777, 781 (S.D.N.Y. 1984)).

Petitioner's bare conclusory allegations of racial discrimination do not state a claim under § 1981. (AP. 13). "Racial motive, 'in the air, so to speak will not do.'" Armstead v. Town of Harrison, 579 F. Supp. at 781 (granting motions to dismiss and for summary judgment on §§ 1981 and 1983 claims arising from prosecution for trespass). Petitioner's reliance on so-called "documentary" evidence (Petition, pp. 19-20) is misplaced. That Lake Shore Hospital sent petitioner a letter initially renewing his privileges was not binding, and the Hospital could subsequently decide to withdraw those privileges based upon a review of petitioner's treatment of patients.

That the decision below does not raise any important federal questions is further demonstrated by the fact that petitioner fails to allege facts showing disparate treatment of similarly situated white physicians which is a crucial element of a § 1981 claim. Long v. Ford Motor Co., supra, 496 F.2d at 500; German v. Killeen, 495 F. Supp. 822, 827 (E.D. Mich. 1980). "To invoke the protection of § 1981, plaintiff must establish that defendants placed more stringent requirements on him because of his race; or that he was unable to make or enforce a contract that a white person could make or enforce; or that he was suspended because of dissimilar treatment caused in part by his race." German v. Killeen, 495 F. Supp. at 827. Furthermore, "these allegations should be supported by reference to specific acts, practices or

policies which resulted in the discrimination complained of." Id.

The courts have not hesitated to dismiss complaints containing insufficient allegations of disparate treatment. See Long v. Ford Motor Co., supra, 496 F.2d at 500; German v. Killeen, supra, 495 F. Supp. at 822; Young v. Skaggs Drug Centers, Inc. 487 F. Supp. 1184 (E.D. Ark. 1980).

The lower courts' decisions of this case do not depart from this accepted course of judicial proceedings. The Complaint and motion papers submitted by petitioner illustrate a long history of disputes between petitioner and the patients he treated as well as the staff. Petitioner did not submit any facts establishing a difference in treatment of white physicians with the same history or incidents of dispute. Petitioner raised this issue below

only in his unsworn memorandum of law in support of his cross-motion for summary judgment where he did no more than make conclusory allegations that respondents treated three white physicians differently than plaintiff by affording them procedural "due process." (A. 116). Petitioner presented no evidence, as was required by Rule 56, FRCP, of these allegations and did not name the three physicians.

Petitioner, who was then represented by counsel, cross-moved for summary judgment and submitted an affidavit which went beyond the allegations in his Complaint. Respondents, too, submitted affidavits to the District Court before it rendered its Order dismissing the Complaint. Therefore, the District Court properly could, and did, grant summary judgment in this case. FRCP 56.

Although he identified, in his Brief to the Second Circuit, the name of one white physician allegedly treated differently, such unsworn statement is not proof. Petitioner's similar belated statements in his Petition to this Court (Petition, p. 28) are also insufficient to warrant the granting of Certiorari.

The District Court's decision was consistent with the well settled law of this Court. The decision and its affirmance by the Second Circuit Court of Appeals does not conflict with decisions of other courts of appeal, nor is it a departure from the usual course of judicial proceedings.

POINT II

A DECISION OF THIS COURT SUBSEQUENT TO THE DISTRICT COURT'S DECISION REMOVES ANY DOUBT THAT THE COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF 42 U.S.C § 1981 BECAUSE IT INVOLVES ONLY POST CONTRACT FORMATION CONDUCT.

Yet another basis for denial of the Petition for Certiorari arises as a result of the Supreme Court's recent decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). In that case, which was decided after the District Court's decision below,[2/] this Court held that 42 U.S.C.

2/ The circuit courts have recognized that this Court's decision in Patterson v. McLean, applies retroactively as a federal court generally applies the law in effect at the time it renders its decision. Gonzalez v. Home Insurance Co., 909 F.2d 716, 723 (2d Cir. 1990); Lavender v. V&B Transmissions & Auto Repair, 897 F.2d 805, 806-07 (5th Cir. 1990); Courtney v. Canyon Television & Appliance Rental, 899 F.2d 845, 849 (9th Cir. 1990).

§ 1981 protects only the right to make contracts and the right to enforce contracts. Id. at 491 U.S. 176. It does not extend to post-contract formation conduct.

The allegations contained in the Complaint concern respondents' alleged conduct after the formation of a contract of employment with petitioner, as a physician with Stat Services working at Lake Shore. The decision to drop petitioner from the Emergency Room Physician's Roster, and thus not schedule him to work, was in effect a termination.

The circuit courts have uniformly held that "an allegedly discriminatory termination of a contract is not actionable under § 1981" because it "involves neither the making nor the enforcement of a contract . . ." Patterson v. Intercoast Management

of Hartford, Inc., 918 F.2d 12, 14 (2d Cir. 1990) cert. denied, _____ U.S. _____, 111 S. Ct. 1686 (1991); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1520 (11th Cir. 1991); Gonzalez v. Home Insurance Co., 909 F.2d 716, 722 (2d Cir. 1990); Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805, 807-8 (5th Cir. 1990); Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990); Prather v. Dayton Power & Light Co., 918 F.2d 1255, 1257 (6th Cir. 1990), cert. denied, _____ U.S. _____, 111 S. Ct. 2889 (1991).[3/]

Thus, petitioner's allegation that the respondents dropped him from the Emergency Room Physician's Roster fails to state a

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3/ Only the Eighth Circuit has held that Patterson does not bar such relief, and a panel of that Circuit has recently criticized this holding. Taggert v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990) (criticizing Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990)).

claim upon which relief can be granted under 42 U.S.C. § 1981. The lower courts' decisions are consistent with this established law of this Court and the decisions of other courts of appeals and do not justify the granting of Certiorari.

POINT III

DR. CARDAMONE WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE HE WAS NOT PERSONALLY INVOLVED IN THE ALLEGEDLY DISCRIMINATORY DECISION

The Petition with respect to Dr. Cardamone should be denied for yet another reason. To be held liable under 42 U.S.C. § 1981 for discrimination in the making and enforcement of contracts, a defendant must be shown to have been directly and personally involved in a deprivation of a plaintiff's rights. Al-Khazraji v. Saint Francis College, 784 F.2d 505, 518 (3d Cir. 1986), aff'd on other

grounds, 481 U.S. 604 (1987); Cain v. Chicago, 619 F. Supp. 1228, 1233 (N.D. Ill. 1985) (even under theory of respondent superior, defendant cannot be held liable under § 1981 absent his direct participation in the acts of discrimination); Howard v. Topeka-Shawnee County Metropolitan Planning Commission, 578 F. Supp. 534, 538, 541 (D. Kan. 1983) (granting summary judgment to commissioner who did not recommend or participate in personnel decision, but only received a notice of proposed termination).

Personal and direct involvement means that an individual defendant must participate in, authorize or direct the discriminatory conduct. Al-Khazraji v. Saint Francis College, supra, 784 F.2d at 518.

The filing of a complaint or report which triggers a disciplinary investigation does not implicate the person who filed the complaint in subsequent civil rights violations and does not constitute the personal involvement necessary to sustain liability for a § 1981 action. Williams v. Smith, 781 F.2d 319, 324 (2d Cir. 1986)[4/]; Sommer v. Dixon, 709 F.2d 173, 174-75 (2d Cir.), cert. denied, 464 U.S. 857 (1983) (granting summary judgment to prison guards who filed Inmate Misbehavior Reports that triggered investigations and hearings, but did not participate in investigation or attend hearing). These cases are

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4/ In Williams v. Smith, the Second Circuit affirmed in relevant part the decision of Judge Curtin. Significantly, part of Judge Curtin's reason for granting summary judgment to the individual defendants was that they did not "personally know, acquiesce or participate in any deprivation of plaintiff's constitutional rights."

indistinguishable from the instant case, and hence, the lower court's decision with respect to Dr. Cardamone is not in conflict with other courts.

The basis of petitioner's Complaint is that respondents have refused to schedule him to work in the emergency room. Because Dr. Cardamone had no control over the scheduling of physicians to staff that emergency room he cannot be liable under § 1981 for this alleged deprivation.

Dr. Cardamone did not participate in, authorize or direct any decision regarding petitioner's emergency room schedule. To the contrary, he did not even discuss these matters with anyone; he had no involvement whatsoever. (A. 58-62).

The only alleged act of involvement is a complaint Dr. Cardamone sent to the ERC questioning the adequacy of petitioner's

choice of medical treatment for one patient. This action does not subject him to § 1981 liability. See Williams v. Smith, supra, 781 F.2d 324; Sommer v. Dixon, supra, 709 F.2d 174-5.

Even if Dr. Cardamone's singular complaint prompted the Stat Services or Lake Shore to reconsider whether or not to schedule plaintiff in the ER, absent Dr. Cardamone's personal involvement in the decision-making process itself, he cannot be liable.

Moreover, petitioner's broad allegations of conspiracy do not cure this fatal defect. A conspiracy allegation in itself cannot establish personal involvement beyond what is alleged elsewhere in the complaint. Trotter v. Chicago, 573 F. Supp. 1269, 1275 (N.D. Ill. 1983) (granting mayor's motion to

dismiss §§ 1981 and 1985(3) claims relating to alleged police brutality); see also Sommer v. Dixon, supra, 709 F.2d at 174 (allegation that defendants conspired to file complaints to set in motion a series of acts by others that they knew would result in civil rights injury, is too conclusory and vague to withstand motion to dismiss). Since petitioner failed to allege an act of personal involvement in the scheduling decision itself, and since Dr. Cardamone did not engage in such an act, Dr. Cardamone cannot be held liable under § 1981.

Summary judgment is appropriate, where, viewing all facts most favorable to the opposing party, there is no genuine issue of material fact. Rule 56 FRCP; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of some alleged factual dispute will not defeat a motion for summary

judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Summary judgment was appropriate in this case because petitioner raised no material issue regarding Dr. Cardamone's personal involvement in the decision to drop petitioner's name from the Emergency Room Physician's Roster.

POINT IV

THE 42 U.S.C. § 1985 AND § 1986 CLAIMS MUST FAIL AS THERE IS NO STATE ACTION

As determined properly by the District Court, petitioner's § 1985 and § 1986 claims must fail for lack of the requisite state action. (See AP. 14 and cases cited therein).

POINT V

THE DISTRICT COURT'S DECISION DOES NOT WARRANT AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The District Court's decision fully comports with the law of the circuits and of this Court. Petitioner, however, repeatedly complains about the delay between the District Court's decision on the merits and the assessment of sanctions, which delayed his ability to appeal. To begin with, the lower court did not violate any statute or rule. Secondly, petitioner was free to move or otherwise request that the court reach a decision on the amount of sanctions. Further, petitioner was not materially prejudiced by the delay in assessing sanctions. He still had the right to appeal the decision. He was aware on the date he received the District Court's original

decision that the Court had ruled against him. Moreover, the lower court correctly applied the law to the facts of this case.

Nor did the District Court judge improperly appoint himself a medical expert, as petitioner claims. The Court simply recognized that there was a dispute concerning appropriate medical treatment between the parties, which dispute led to petitioner's being dropped from the Emergency Room Physician's Roster. The court did not resolve the merits of the medical arguments or become its own medical expert in this regard. (AP. 12-13).

Finally, because the federal claims were properly dismissed and because they were not developed by plaintiff in his complaint or on the motion, petitioner's state law claims were properly dismissed by the courts, in their discretion.

Accordingly, petitioner lacks a viable basis for petitioning for Certiorari. This Court is not the proper forum to address petitioner's concern's regarding a particular judge or judges.

CONCLUSION

For the reasons discussed above, respondent Joseph G. Cardamone, M.D. respectfully requests that petitioner's request for Certiorari be denied.

Dated: October 11, 1991

Respectfully submitted,

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